

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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BRANCH BANKING AND TRUST
COMPANY, a North Carolina banking
corporation,

Plaintiff,

v.

ELOY BUSINESS PARK, LLC, a Nevada
limited liability company; YOEL INY,
individually and as Trustee of the Y&T INY
FAMILY TRUST dated June 8, 1994; NOAM
SCHWARTZ, individually and as Trustee of
the NOAM SCHWARTZ TRUST dated
August 19, 1999; D.M.S.I., LLC, a Nevada
limited liability company; and DOES 1
through 10, inclusive,

Defendants.

2:12-CV-01679-LRH-PAL

ORDER

This is a final deficiency judgment entered in favor of plaintiff Branch Banking and Trust Company ("Branch Banking") and against defendants in the amount of two million nine hundred twelve thousand eight hundred ninety-five dollars and seventy-two cents (\$2,912,895.72) plus interest at the default interest rate of 6.75% plus the 30-day LIBOR Rate.

I. Facts and Procedural History

On September 20, 2007, Borrower Eloy Business Park, LLC ("Borrower") executed and delivered a Promissory Note Secured by Deed of Trust to Colonial Bank, N.A. ("Colonial

1 Bank”), in the original amount of \$6,300,000.00 (the “Note”). ECF No. 52, Ex. 1; ECF No. 53,
2 Ex. 2.¹ The Note was secured by a Deed of Trust and Security Agreement and Fixture Filing
3 with Assignment of Rents (“Deed of Trust”), dated September 20, 2007, encumbering certain
4 real property in Pinal County, Arizona (the “Property”). ECF No. 52, Ex. 2; ECF No. 53, Ex. 3.
5 Also on September 20, 2007, Defendant Yoel Iny (“Guarantor”) executed and delivered to
6 Colonial Bank a Guarantee (the “Guarantee”). ECF No. 52, Ex. 3. Pursuant to the Guarantee,
7 the Guarantors guaranteed the payment of all indebtedness of the Borrower under the loan
8 evidenced by the Note (the “Loan”). *Id.*

9 On August 14, 2009, Colonial Bank was closed by the State Banking Department of the
10 State of Alabama and the Federal Deposit Insurance Corporation (“FDIC”) was named receiver
11 in order to liquidate and distribute the assets of Colonial Bank. ECF No. 52, Ex. 4; ECF No. 53,
12 Ex. 5. On September 28, 2011, the FDIC executed an Assignment of Security Instruments,
13 Notes and Other Loan Documents (the “Assignment”), to be deemed effective as of August 14,
14 2009. *Id.* Pursuant to the terms of the Assignment, the FDIC assigned all rights, title, and
15 interest in the Note, the Deed of Trust, and the Guarantee to Branch Banking. *Id.* The
16 Assignment was recorded in Pinal County, Arizona on November 4, 2011. *Id.*

17 The Borrower failed to pay the outstanding principal balance of the loan due under the
18 Note on September 24, 2009. ECF No. 53 at 5. By demand letter dated June 16, 2011 (the
19 “Demand Letter”), Branch Banking indicated its intent to take steps to exercise its rights and
20 remedies under the Loan on or after July 8, 2011. ECF No. 53, Ex. 7. On December 16, 2011,
21 Branch Banking commenced a judicial foreclosure action under the Deed of Trust by filing a
22 Verified Complaint in the Superior Court of the County of Pinal, Arizona. ECF No. 52, Ex. 5.
23 A Default Judgment ordering the judicial foreclosure of the Property in full or partial satisfaction
24 of the outstanding balance due under the Loan via Sheriff’s sale was entered by the Superior
25 Court of the County of Pinal, Arizona, on March 19, 2012. ECF No. 52, Ex. 7; ECF No. 50, Ex.

26

¹ Refers to the court’s docket number.

1 8. The Sheriff of the County of Pinal, Arizona, sold the Property on July 19, 2012, at public
2 auction for a cash bid of \$580,000.00 in partial satisfaction of the Loan. ECF No. 52, Ex. 8; ECF
3 No. 53, Ex. 9.

4 On September 24, 2012, Branch Banking filed a Complaint before this Court, alleging
5 claims for deficiency, breach of guarantee, and breach of the covenant of good faith and fair
6 dealing. ECF No. 1. On June 23, 2015, the Court granted Branch Banking's Motion for
7 Summary Judgment, and denied Defendants' Motion for Summary Judgment. ECF No. 77. The
8 Court also directed the parties to file briefs for a deficiency hearing pursuant to NRS § 40.457(1).

9 On September 18, 2015, Defendants and Branch Banking filed their opening briefs. ECF
10 No. 85 and 86. On October 23, 2015, Defendants and Branch Banking filed their respective
11 responses. ECF No. 90 and 91. On May 16, 2016, the parties stipulated that the fair market
12 value of the property on July 19, 2012 was \$600,000. ECF No. 94.

13 **II. Legal Standard**

14 Pursuant to NRS 40.455, a court shall award a deficiency judgment to a judgment
15 creditor upon a finding that there is a deficiency between the proceeds of a trustee's sale and the
16 balance owed to the judgment creditor. NRS 40.455(1). However, before a court issues a
17 deficiency judgment, the court must take evidence "concerning the fair market value of the
18 property sold as of the date of foreclosure sale or trustee's sale." NRS 40.457(1). After
19 determining the fair market value of the property, "the court shall award a judgment against the...
20 guarantor... who is personally liable for the debt." NRS 40.459(1). The amount of the
21 deficiency judgment shall not be more than "[t]he amount by which the amount of the
22 indebtedness which was secured exceeds the fair market value of the property sold at the time of
23 the sale, with interest from the date of the sale." NRS 40.459(1)(a).

24 **III. Discussion**

25 This is a fair market valuation determination pursuant to NRS 40.457. The issues before
26 the court are (1) what was the fair market value of the underlying property at the date of the sale,

1 and (2) what amount should be entered as a deficiency judgment, if any. The court shall address
2 both issues below.

3 **A. Fair Market Valuation**

4 The parties have stipulated that the fair market value of the property on July 19, 2012,
5 was \$600,000. ECF No. 94. As this is the only evidence of fair market value, the court shall
6 accept this figure and values the underlying property at \$600,000.

7 **B. Deficiency Judgment Amount**

8 Branch Banking contends that the amount of indebtedness on July 19, 2012, the date of
9 the Sheriff's sale was \$3,512,895.72. In response, Defendants argue that Branch Banking cannot
10 competently prove the amount of indebtedness and that Defendants are entitled to off-sets, which
11 would result in a finding that there is no deficiency.

12 First, Defendants argue that Branch Banking cannot prove the amount of the principal
13 balance of the loan because Branch Banking is relying on the declaration of Peter Nugent, a
14 senior vice president at Branch Banking. Defendants argue that Mr. Nugent does not have
15 personal knowledge and cannot lay a sufficient foundation for the books and records of Branch
16 Banking in order to establish the facts of his declaration. This Court has already rejected such an
17 argument. ECF No. 77. Further, as the court has already noted, Defendants have independently
18 authenticated the loan documents. Ronnie Schwartz, Defendants' Person Most Knowledgeable,
19 acknowledged and authenticated each of the loan documents at issue. *See* ECF No. 53, Ex. 10.
20 Thus, the declaration and related loan documents establish an amount of indebtedness of
21 \$3,512,895.72.

22 Second, Defendants argue that Branch Banking has failed to prove that taxes paid,
23 appraisals, environmental reviews, costs, late fees, and attorney's fees related to the foreclosure
24 action should be included in the indebtedness. However, Branch Banking is entitled to recover
25 these amounts. *See, e.g., Branch Banking & Trust Co. v. Jarrett*, No. 3:13-CV-00235-RCJ, 2014
26 WL 2573483, at *13 (D. Nev. June 9, 2014), appeal dismissed (Dec. 17, 2014); *Woori Am. Bank*

1 v. *Sahara Westwood Hotel, LLC*, No. 2:10-CV-00358-KJD, 2011 WL 2295072, at *7 (D. Nev.
2 June 8, 2011).

3 Third, Defendants argue that Branch Banking has not established the correct interest rate
4 to be applied to the loan, which the loan stated would be a base rate plus a variable rate derived
5 from the LIBOR rate. ECF No. 1, Ex. 1. Defendants argue that Branch Banking provides no
6 evidence of what the LIBOR was at all relevant times of the subject loan. However, the LIBOR
7 rate is readily determinable information, and Branch Banking has provided the amount of
8 accrued interest.

9 Fourth, Defendants argue that Branch Banking is not entitled to an award of attorney's
10 fees and costs related to the foreclosure action because Branch Banking did not seek those fees in
11 the Arizona judicial foreclosure action, Branch Banking violated the Work-Out Agreement, and
12 Branch Banking has not established that the fees and costs are reasonable pursuant to Nevada
13 law. As to the first argument, this Court has already held that Branch Banking's failure to
14 request or obtain a money judgment in the judicial foreclosure action in Arizona does not affect
15 its right to pursue a deficiency in Nevada. ECF No. 77. As to the second argument, this Court
16 has already rejected Defendants' position as to any alleged breach of an oral "Work-Out
17 Agreement." ECF No. 38. Finally, as to the third argument, the Deed of Trust establishes
18 liability for attorneys' fees incurred in connection with any default. ECF No. 1, Ex. 2. The
19 Court has reviewed the submitted invoices accrued in the Arizona judicial foreclosure action and
20 determines they are reasonable. Therefore, the Court will award Branch Banking \$8,104.41 for
21 the attorneys' fees that were accrued in the Arizona judicial foreclosure action.

22 Finally, Defendants argue that they are entitled to off-sets due to Branch Banking's delay
23 in foreclosing and in relation to the Work-Out Agreement. However, Branch Banking had no
24 duty to immediately foreclose. *See, e.g., Fed. Deposit Ins. Corp. v. Coleman*, 795 S.W.2d 706
25 (Tex. 1990). Further, Defendants executed an acknowledgment letter acknowledging that any
26 acceptance of payments by Branch Banking after Defendants' default did not prejudice Branch

1 Banking with respect to any of its rights and remedies under the subject loan documents. ECF
2 No. 91, Ex. 1. Next, to the extent Defendants request off-sets on the basis of Branch Banking's
3 alleged breach of an oral "Work-Out Agreement" to forebear enforcing certain rights under the
4 Loan documents, the Court has already rejected Defendants' position. ECF No. 38. Therefore,
5 Defendants are not entitled to any off-sets.

6 Thus, the amount of indebtedness as of June 21, 2012, was \$3,512,895.72. Subtracting
7 \$600,000, the fair market value of the Property, which was higher than the actual sale price,
8 Branch Banking is entitled to a deficiency judgment of \$2,912,895.72 plus interest at the default
9 interest rate of 6.75% plus the 30-day LIBOR Rate. Accordingly, the court shall enter a final
10 deficiency judgment in this amount. In addition, Defendants owe Branch Banking \$8,104.41 for
11 the attorneys' fees in the Judicial Foreclosure Action.


12 **IV. Conclusion**

13 IT IS THEREFORE ORDERED that the clerk of court shall enter a final deficiency
14 judgment in favor of plaintiff Branch Banking, and against Defendants, in the amount of two
15 million nine hundred twelve thousand eight hundred ninety-five dollars and seventy-two cents
16 (\$2,912,895.72) plus interest at the default interest rate of 6.75% plus the 30-day LIBOR Rate.

17 IT IS FURTHER ORDERED that the clerk of court shall enter an award of attorney's
18 fees for the Judicial Foreclosure Action in favor of plaintiff Branch Banking and against
19 Defendants in the amount of eight thousand one hundred four dollars and forty-one cents
20 (\$8,104.41).

21 IT IS SO ORDERED.

22 DATED this 11th day of July, 2016.

23 
24 LARRY R. HICKS
25 UNITED STATES DISTRICT JUDGE
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